

State Water Resources Control Board

APR 24 2013

Mr. Alexander R. Coate
General Manager
East Bay Municipal Utility District
375 Eleventh Street
Oakland, CA 94607-4240

Dear Mr. Coate:

BAY-DELTA RELATED PLANNING AND PERMITTING

Your March 28, 2013 letter to Secretary for Natural Resources John Laird and State Water Resources Control Board (State Water Board) then-Chairman Charlie Hoppin requests certain commitments in connection with the Bay-Delta Conservation Plan (BDCP) and the Bay-Delta Water Quality Control Plan (Bay-Delta Water Quality Plan). Recognizing the different roles and responsibilities of the agencies involved, I am responding on behalf of the State Water Board.

In the Sacramento-San Joaquin Delta Reform Act of 2009, the California Legislature determined that the existing Delta policies were not sustainable and provided a framework for the sustainable management of the Delta ecosystem and water supply. The Natural Resources Agency and its departments involved in the BDCP process have coordinated with the State Water Board, which will have to review and approve any BDCP-related water right change petitions, to effectuate the Delta Reform Act's framework. Likewise, the State Water Board's water quality control planning and implementation will also further sustainable management of the Delta ecosystem and water supply, but reach more broadly, recognizing the board's broader geographic and regulatory responsibility. Our agencies are acting in a coordinated fashion, while meeting the distinct statutory mandates and independent responsibilities of each agency.

It is important to recognize a key distinction between the BDCP and related approvals, including approval of any water right change petitions necessary to implement the adopted BDCP, on the one hand, and the Bay-Delta Water Quality Plan and implementation proceedings on the other. The BDCP is intended to obtain the approvals for the State Water Project and the Central Valley Project to operate consistent with state and federal endangered species laws. The BDCP is not intended to serve as the endangered species consultation or approval for other projects that may be affecting listed species in the Delta. Similarly, any water right change petition contemplated in connection with the BDCP would be for a change in the point of diversion for the State Water Project and the Central Valley Project, not for any other water right holders. The Bay-Delta Water Quality Plan, on the other hand, is intended to protect the beneficial uses of the Delta, taking into account the effect of all diversions, whether within or upstream of the Delta, that may affect Delta water quality.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE OFFICER

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BDCP-Related Change Petition

The recently released draft chapters of the BDCP include several alternatives for dual or isolated conveyance, all involving a new point of diversion or points of diversion in the North Delta. Before implementing any of these alternatives, the Department of Water Resources and the United States Bureau of Reclamation would need approval of a water right change petition authorizing the new point or points of diversion. Water Code section 85088 further provides that construction of a facility cannot begin until the State Water Board approves the change in point of diversion.

In acting on a water right change petition, the State Water Board will be the decision maker in an adjudicative proceeding. Consistent with due process requirements and fairness to all participants in that proceeding, it would be inappropriate for the State to make any prior commitment as to what the outcome of the proceedings will be.

Of course, the State Water Board will act consistent with the legal requirement that that the change not operate to the injury of any legal user of water, and will condition or deny requested changes as necessary to apply that requirement. The State Water Board will also act consistent with applicable requirements for the protection of instream beneficial uses. And the State Water Board will act consistent with its own regulations.

The State Water Board's regulations include a standard permit term, already included in the water rights for the State Water Project and the Central Valley Project, reserving State Water Board authority to reopen the permit or license pursuant to the public trust and reasonable use doctrines. This standard term is consistent with the holding of the Court of Appeal in *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82 that the public trust and reasonable use doctrines provide the State Water Board continuing authority to require the State Water Project and the Central Valley Project to implement applicable water quality objectives as established in the Bay-Delta Water Quality Plan. The State Water Board may consider adopting additional more specific reservations of authority in connection with its review of a water right change petition, but consistent with its role as an impartial decision maker, it would be improper for the State Water Board to make a commitment in advance to adopt any particular condition.

You also request that the State Water Board ensure that the BDCP EIR/EIS evaluate a proposed condition requiring the State Water Project and Central Valley Project compliance with revisions to the Bay-Delta Water Quality Plan. The State Water Board and the Department of Water Resources have consulted and will continue to work together to ensure that the environmental documentation for the BDCP includes the information necessary for any State Water Board approvals, including approval of any necessary water right change petitions. As instructed by the Court of Appeal in *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, any water right approvals will include any applicable requirements specified in the Bay-Delta Water Quality Plan's program of implementation. Similarly, the State Water Board will condition the water quality certifications for actions implementing the BDCP as necessary to implement the Bay-Delta Water Quality Plan and any other applicable water quality control plan or state policies for water quality control. The BDCP EIR/EIS is being prepared consistent with this understanding. Similarly, any additional environmental documentation prepared for specific restoration activities carried out pursuant to the BDCP will need to be prepared consistent with this understanding.

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Water Quality Control Planning and Implementation

Your letter urges that the Bay-Delta Water Quality Plan confirm the policies incorporated in the BDCP. As discussed above, there is an important distinction between water quality control planning and the BDCP process. As part of its water quality planning function, the State Water Board adopts or updates water quality objectives and a program of implementation based on coordinated control of all factors affecting water quality. In *United States v. State Water Resources Control Board* the Court of Appeal held that it was error to adopt a plan based on what could be achieved through regulation of the State Water Project and the Central Valley Project, without considering the impact of upstream diversions. Accordingly, it is appropriate for the BDCP to focus on the impacts of Delta diversions by the State Water Project and the Central Valley Project, while leaving to other proceedings the impacts of upstream diversions. The State Water Board's Bay-Delta Water Quality Plan must take a broader view.

As part of the program of implementation adopted within the Bay-Delta Water Quality Plan, and in specific water rights actions implementing the plan, the State Water Board will be guided by the policies of the Water Code, including policies recognizing the rights of senior water right holders and preferences afforded the needs for beneficial uses within watersheds or areas of origin. All of these policies must be applied consistent with the fundamental policy to prevent the waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of water. These principles are not necessarily consistent with your suggestion that no entity be required to make change in excess of that entity's proportionate contribution to the problem. In particular, a junior water right holder may be required to make curtailments before curtailments are imposed on senior water right holders, even if the junior water right holder's diversions are relatively small compared to those of senior water right holders.

In sum, while there are many different actions underway by the State Water Board and its sister agencies, they have been closely coordinated amongst the various agencies. These actions at times have common purposes, but the State Water Board's water quality control planning efforts are distinct and broader than just the BDCP or Delta. As the State Water Board continues development of its Bay-Delta Water Quality Plan I look forward to working with EBMUD and all interested persons.

Sincerely,



Felicia Marcus, Chair

cc: Mr. John Laird, Secretary
California Natural Resources Agency
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